STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 28, 2003
v JACK DUANE HALL, Defendant-Appellant.	No. 228551 Genesee Circuit Court LC No. 99-005341-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JACK DUANE HALL, Defendant-Appellant.	No. 228552 Genesee Circuit Court LC No. 99-005340-FC

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant was tried before a jury in two separate cases that were consolidated for trial. In L Ct. No. 99-005341-FC, the jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b, one count of second-degree CSC, MCL 750.520c, two counts of felonious assault, MCL 750.82, and two counts of attempted murder, MCL 750.91. The trial court sentenced defendant to concurrent prison terms of thirty to fifty years each for the first-degree CSC convictions, ten to fifteen years for the second-degree CSC conviction, two to four years each for the felonious assault convictions, and fifty to seventy-five years each for the attempted murder convictions.

In L Ct. No. 99-005340-FC, the jury convicted defendant of two counts of assault with intent to commit murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227b, and disarming a peace officer, MCL 750.479b(2). The trial court sentenced defendant to concurrent prison terms of eighteen to thirty-five years each for the

assault convictions and five to ten years for the conviction for disarming a peace officer, to be served consecutive to a two-year term for the felony-firearm conviction.

The trial court denied defendant's motion for a new trial in both cases. Defendant now appeals as of right from his judgments of sentence in each case. The appeals have been consolidated for this Court's consideration. We affirm.

I. Nature of the Case and Procedural History

In L Ct. No. 99-005341-FC, the evidence at trial showed that defendant assaulted two young sisters on a bike trail and forced them at knife point into a wooded area where he sexually assaulted both of them. Defendant subsequently attempted to kill the victims by strangling the girls with his hands and then with his shoelace. The girls lost consciousness, but survived the ordeal. As they awoke, they saw that defendant had left the area and the girls immediately sought help nearby.

In L Ct. No. 99-005340-FC, the police went to defendant's parents' home to arrest defendant for the crimes committed against the girls. It was dark outside and defendant was apparently hiding in the backyard. Defendant assaulted one of the officers and was able to wrestle her gun away from her. According to witnesses, defendant fired the gun three times, aiming at one or more other officers who were also at the scene. Defendant escaped into the woods behind his parents' home, but turned himself in to the police two days later.

The primary defense theory at trial was that the girls had misidentified defendant as the person who sexually assaulted them.

II. Ineffective Assistance of Counsel

Defendant argues that his attorney was ineffective for not moving to sever the two cases for trial. Following an evidentiary hearing, the trial court denied defendant's motion for a new trial on this issue. The standard of review on questions of ineffective assistance of counsel is a mixed standard. First, if the trial court finds certain facts in relation to a claim of ineffective assistance of counsel, those findings are reviewed for clear error. MCR 2.613(C); *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002). Second, whether the test for ineffective assistance of counsel was satisfied involves a question of constitutional law, which we review de novo. *Id.*

This Court will not reverse a conviction on the basis of ineffective assistance of counsel unless defendant shows that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens,* 446 Mich 298, 338; 521 NW2d 797 (1994). Also, the defendant must overcome the strong presumption that his counsel's action is sound trial strategy. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr,* 451 Mich 115, 124; 545 NW2d 637 (1996).

At the evidentiary hearing on this issue, defendant's attorney explained that he made a strategical decision not to sever the cases. He calculated that by trying the cases together, it would be easier to attack the credibility of the police officers and the adequacy of the police investigation. We will not substitute our judgment for that of trial counsel in matters of trial strategy. *People v Kevorkian*, 248 Mich App 373, 414; 639 NW2d 291 (2001). The fact that counsel's decision may not have resulted in a successful outcome for defendant does not justify finding that counsel was ineffective. *Id.* at 414-415. Defendant has failed to overcome the presumption of sound strategy. Thus, the trial court did not err in denying defendant's motion for a new trial based on ineffective assistance of counsel.

Further, defendant says that his attorney was ineffective for not moving to suppress evidence obtained by the police after defendant's girlfriend allowed the police into defendant's apartment. There was no dispute that defendant's girlfriend did not live with defendant, but she had a key to the apartment. The officer involved testified that defendant's girlfriend voluntarily opened the door to the apartment. However, the girlfriend testified that she opened the door because she was threatened by the police with arrest if she did not do so.

A consent search can be valid where a third party, who possesses common authority over the premises searched, provides the consent to search. *People v Grady*, 193 Mich App 721, 724; 484 NW2d 417 (1992). In *Grady*, this Court, relying on *Illinois v Rodriguez*, 497 US 177; 110 S Ct 2793; 111 L Ed 2d 148 (1990), held that the Fourth Amendment only prohibits unreasonable searches and seizures; therefore, if the police reasonably believe they have a valid consent to search, the consent will be upheld as valid. *Grady*, *supra* at 724-726. Whether the consent to search was freely and voluntarily given is a question of fact based upon the totality of the circumstances. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999).

Under these circumstances, defendant has not shown that his attorney was ineffective. First, whether counsel could have successfully challenged the initial police entry into defendant's apartment turned on the credibility of defendant's girlfriend's account of the alleged threat. The record demonstrates that defendant's girlfriend did not mention being threatened during an interview with a defense investigator and did not make this claim until shortly before trial. It is questionable whether counsel had sufficient notice of the alleged and somewhat dubious threat to file a motion to suppress before trial. Additionally, at trial, defendant's girlfriend's account of the alleged threat varied. She first claimed that she was threatened verbally, but later claimed that she felt threatened by the officer's conduct, not by what he said. Unsurprisingly, the trial court determined that defendant's girlfriend's testimony was lacking in credibility and, in this ruling, we find no clear error. Furthermore, after entering defendant's apartment and determining that defendant was not there, the officers secured a search warrant. Even if the initial police entry was improper, it is apparent that the affidavit submitted in support of the search warrant would have supported a finding of probable cause to search defendant's apartment absent any tainted information obtained during the brief, initial entry. *People v Melotik*, 221 Mich App 190, 201; 561 NW2d 453 (1997). Thus, the outcome of this case would not have changed had defense counsel successfully challenged the initial police entry.

We also reject defendant's claim that counsel was ineffective for failing to object to the admission of defendant's "mug shot" photograph at trial. The "mug shot" photo was part of a

photographic lineup shown to one of the victims. Defense counsel explained at the evidentiary hearing that he made a strategical decision to allow the photograph, along with the other photographs in the array, so the jurors could see for themselves that one of the victims may have identified another person as the suspect. Considering that the issue of defendant's identification was the principal issue at trial, we will not second-guess counsel's decision.[1] *Kevorkian, supra*; *People v Travier,* 39 Mich App 398, 401-402; 197 NW2d 890 (1972).

III. Exclusion of Witness Testimony

Defendant also argues that his right to present a defense was compromised because the trial court excluded two defense witnesses from testifying. We find no error.

A trial court's decision to exclude evidence that tends to incriminate another individual for the charged offense is generally reviewed for an abuse of discretion. *People v Kent,* 157 Mich App 780, 793; 404 NW2d 668 (1987).

A defendant in a criminal case has the constitutional right to present a defense. Const 1963, art 1, § 13; US Const, Ams VI, XIV; *People v Kurr,* ___ Mich App ___; ___ NW2d ___ (2002) (Docket No. 228016, issued 10/4/02), slip op at 5. In *Kent, supra* at 793, this Court stated:

> We have found no Michigan cases addressing a rule concerning admissibility of other similar crimes to cast doubt on a defendant's guilt. Other jurisdictions have held that evidence tending to incriminate another is admissible if it is competent and confined to substantive facts which create more than a mere suspicion that another was the perpetrator. See, e.g., *Fortson v State,* 269 Ind 161; 379 NE2d 147 (1978); *People v Whitney,* 76 Cal App 3d 863; 143 Cal Rptr 301 (1978); *People v Luigs,* 96 Ill App 3d 700; 421 NE2d 961 (1981).
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> Without any facts suggesting that someone else set the other fire, there could be no more than a mere suspicion that it was the same person who set the Harvey fire and that that person was not defendant. In our opinion, the court did not abuse its discretion in determining that evidence of the other fire was too remote to be probative. *People v Vanderford,* 77 Mich App 370, 374; 258 NW2d 502 (1977).

A trial court may properly exclude testimony tending to identify another person as the perpetrator where the evidence does no more than raise a mere suspicion that someone else was responsible for the offense.

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[1] Because defense counsel intentionally elected to allow the jurors to view defendant's photograph, this case is distinguishable from *Matthews v Abramajtys,* 92 F Supp 2d 615, 640-641 (ED Mich, 2000). We also disagree with defendant that the photograph necessarily allowed the jury to infer that he had a prior criminal record. See *People v Sinclair,* 247 Mich App 685, 690-691; 638 NW2d 120 (2001); *People v Wilson,* 242 Mich App 350, 353-354; 619 NW2d 413 (2000). There was no mention of when or why the photograph was taken.

Here, the trial court did not abuse its discretion in barring Elaine Boss from testifying. Her proposed testimony was too remote in time to be relevant. We also conclude that Patricia Hyde's proposed testimony, while not remote, was nevertheless properly excluded. Hyde's account of the person she allegedly mistakenly thought was defendant was so lacking in detail that it failed to create more than a mere suspicion and speculation that the person she saw could have committed the offenses. *Kent, supra*.

IV. DNA Testing

Defendant next maintains a due process right to test a DNA sample taken from a person police detained shortly after the crime. We disagree. We conclude the trial court did not err in denying defendant's post-trial motion for new trial or for DNA testing.

Less than three hours after the crime took place, police detained within five miles of the crime scene a possible suspect who was wearing a blue tank top and blue jean shorts, as described by the victims. This detainee was also carrying a pocket knife consistent with the description of the knife used by the perpetrator. Inconsistent with the victim's description, however, was the physical size of this detainee. The victims described the perpetrator as being slight in build and approximately five feet, six inches tall, while the detainee was six feet four inches tall and weighed 225 pounds. Additionally, the detainee was wearing gray boxer shorts at the time he was stopped by police and the victims described the perpetrator's underpants as being red and blue bikini shorts. The detainee freely gave the police a DNA sample. However, the police never tested the detainee's DNA sample. The police ruled this person out as a possible suspect because of the vast differences in physical characteristics between the detainee and the perpetrator and because the evidence that was being compiled as the investigation developed was pointing in other directions.[2]

One of the victims told police that the perpetrator wore sunglasses. On the day after the assault, police found a pair of sunglasses near the crime scene. Also found in the same vicinity were sandals belonging to the victims. Captain Michael Compeau testified that he removed the sunglasses from the crime scene using his bare hands. Captain Compeau carried the sunglasses by the ear stems. Captain Compeau testified that at the time, he was only thinking of preserving possible fingerprint evidence and was not thinking about DNA evidence.

The sunglasses were subjected to DNA testing, which revealed that material taken from the area of the ear stems was sufficient only to detect one genetic system out of eight possible systems. The more genetic systems that are detected, the greater the limitation that can be placed on the sample when compared to the general population. The sole genetic system detected in this case was not rare among the population. For the Caucasian population, about one out of every three males will have the same genetic system in his DNA as that found on the ear stems of the sunglasses. DNA testing done on defendant revealed that defendant was not the source of the

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[2] Also significant is the fact that other than the minimal DNA evidence found on the sunglasses and described in greater detail in this opinion, there was no other DNA evidence found on the victims that would warrant further DNA testing.

DNA found on the sunglasses. Significantly, this evidence was presented at trial. DNA testing done on Captain Compeau indicated that Captain Compeau's DNA was consistent with the material found on the ear stems of the sunglasses. The police attempted to obtain DNA evidence from the nose area of the sunglasses but no DNA evidence could be found. [3]

We note that no Michigan court has found a due process right to post trial DNA testing of evidence collected in the course of a criminal investigation and we are not inclined to recognize such a right in this case. Moreover, Michigan has recently enacted a statute that governs post trial DNA testing. MCL 770.16. In order for post trial DNA testing to be considered under this statute, the defendant must "[p]resent prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of . . . the crime that resulted in the conviction." MCL 770.16(3)(a). In this case, testing the detainee's DNA sample was not material because it would not have provided evidence that would in any way shed light on the issue whether defendant was the perpetrator of the offense for which he was convicted. As previously stated, evidence was presented at trial that defendant was not the source of the DNA found on the sunglasses. Moreover, defendant can not satisfy MCL 770.16(7)(a), which requires that the DNA testing establish that only the perpetrator of the offense could be the source of the material collected. The DNA that was collected from the sunglasses was insufficient to identify the perpetrator because the genetic material found on the sunglasses was common to one-third of the Caucasian population.

Defendant also has not shown that he was entitled to a new trial based upon traditional notions of newly discovered evidence. The other suspect's identity and DNA was not newly discovered evidence, but was available to the defense before trial. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

V. Voir Dire

Defendant claims that the trial court failed to conduct a sufficiently probing voir dire regarding the effects of media coverage with respect to juror Foster. Defendant did not object to the court's voir dire examination or challenge the juror for cause. Therefore, this issue is not preserved. Accordingly, we review the issue for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

If there is extensive pretrial publicity, the trial court should allow adequate questioning of the jurors so that the parties can intelligently exercise challenges for cause and peremptory challenges. *People v Jendrzejewski*, 455 Mich 495, 509; 566 NW2d 530 (1997). The record

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[3] If the sunglasses were left behind by the perpetrator, they had been exposed to the elements over night and for several hours the following day before being discovered. This may well explain why there was no DNA evidence found in the area of the nose pad while some DNA evidence found on the ear stems; the area that Captain Compeau touched with his bear hands at the time he confiscated this evidence.

reveals that the trial court questioned the jurors about the publicity in this case, and asked about the type of publicity the jurors had heard, when they heard it, whether they had formed any opinions, and whether they could be impartial. *People v Lee*, 212 Mich App 228, 249; 537 NW2d 233 (1995). The court's questioning was sufficient to allow the parties to intelligently exercise any challenges.

Further, the record does not support defendant's claim that juror Foster attempted to deceive the court about her ability to be impartial. Although the juror stated that she felt defendant must be guilty when she first heard the media reports, this was not a ground for dismissing her for cause because she stated that she could set aside her previous opinions and decide this case with an open mind. *Lee, supra* at 251. It is apparent that neither defense counsel nor the court were persuaded that she was insincere, because there was no effort to challenge her for cause. We must defer to the trial court's assessment of the juror's ability to be impartial. *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000). Accordingly, plain error has not been shown.

VI. Prosecutorial Misconduct

Defendant also says that the prosecutor committed misconduct requiring reversal during closing argument. Because defendant did not preserve any of the alleged errors with an appropriate objection at trial, he must show a plain error that affected his substantial rights. *Carines, supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Reversal is not warranted if a cautionary instruction could have cured any prejudice resulting from the prosecutor's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267 nn 5-7; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Moreover, a prosecutor is afforded great latitude in closing arguments. He is permitted to argue the evidence and make reasonable inferences arising from the evidence to support his theory of the case. *Bahoda, supra* at 282. However, the prosecutor must refrain from making prejudicial remarks. *Id*. at 283. While a prosecutor has a duty to see to it that a defendant receives a fair trial, a prosecutor may use "hard language" when it is supported by the evidence and he is not required to phrase his arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). A prosecutor is free to argue that a witness, including the defendant (or the defense theory), is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

First, we find no error stemming from the prosecutor's comments about the knife found in the abandoned vehicle on defendant's parents' property. Photographs of the knife were introduced to show how it appeared when it was found. Thus, the prosecutor could properly comment upon the condition and appearance of the knife when found. Defendant has not shown that the prosecutor's remarks constituted plain error.

We agree with defendant that the prosecutor stated a fact not in evidence when he stated that the victims had described defendant as wearing underwear with a black band. Neither victim

testified that defendant wore underwear with a black band. However, because the presence of a black band was not a material issue at trial, and because any prejudice arising from the prosecutor's remark could have been cured by a cautionary instruction upon request, reversal is not warranted. The statement did not affect defendant's substantial rights. *Carines, supra*.

The prosecutor did not misstate to the jury that the younger victim had picked defendant out of one of the photographic lineups. When the prosecutor's remarks are considered in context, it is apparent that the prosecutor was discussing the younger victim's trial testimony, not an out-of-court identification. Thus, plain error has not been shown.

Next, the prosecutor's suggestion that defendant's family may have replaced the bullets in the deputy's gun before returning it to the police was a fair comment on the evidence and reasonable inference therefrom, and was also responsive to defense counsel's closing argument. Therefore, it was not improper. *People v Kennebrew,* 220 Mich App 601, 608; 560 NW2d 354 (1996).

Finally, the prosecutor did not improperly shift the burden of proof to defendant when responding to other comments made in defense counsel's closing argument. *Id*.

VII. Admission of Evidence from Apartment

Defendant further maintains that he was denied a fair trial because of the admission of certain items of physical evidence seized from his apartment, and the knife found on defendant's parents' property. Because defendant did not object to any of this evidence below, he must show that a plain error affected his substantial rights. *Carines, supra*.

Relevant evidence is admissible, MRE 402; *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999), and evidence is relevant if it tends to make the existence of a fact at issue more or less probable than it would be without the evidence. MRE 401; *Campbell, supra*. Here, all of the challenged evidence was relevant to the facts at issue because they circumstantially linked defendant to the charged crimes. Whether the evidence matched the victims' descriptions was a question of fact for the jury to resolve.

Defendant also argues that the evidence, if relevant, should nonetheless have been excluded under MRE 403. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Sabin (After Remand),* 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice does not mean any prejudice, but refers to "the tendency of the proposed evidence to adversely effect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Pickens, supra* at 336-337, quoting *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). See also *People v Vasher*, 449 Mich 494, 501-502; 537 NW2d 168 (1995). Here, while the evidence was damaging to defendant, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Defendant has not shown that plain error resulted from the admission of this evidence. *Carines, supra*.

VIII. In Pro Per Claims of Ineffective Assistance of Counsel

Finally, defendant argues, in pro per, that his trial attorney was ineffective. Because defendant did not pursue these ineffective assistance of counsel claims below, our review of this issue is limited to mistakes apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Defendant first argues that his attorney was ineffective for failing to challenge the pretrial identification of defendant by one of the victims. The record discloses that defense counsel did move to bar the witness' out-of-court identification, but was unsuccessful. Therefore, this argument is without merit. Further, it is not apparent from the record that the victims' viewing of defendant at the preliminary examination was an impermissibly suggestive confrontation so as to require exclusion of the victims' identifications of defendant at the preliminary examination. *People v Williams*, 244 Mich App 533, 542-543; 624 NW2d 575 (2001).

Defendant's remaining ineffective assistance of counsel claims involve matters previously addressed in this opinion. As discussed earlier in this opinion, it is not apparent that juror Foster was excusable for cause. Further, to the extent defense counsel made a strategical decision not to challenge the juror, either for cause or peremptorily, defendant has failed to overcome the presumption of sound strategy. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999).

IX. Cumulative Effect of Alleged Errors

Defendant also argues that he is entitled to a new trial due to the cumulative effect of multiple errors. An analysis of each of defendant's claims reveals that defendant has failed to show that multiple errors occurred. Accordingly, defendant cannot show that the cumulative effect of multiple errors denied him a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Brian K. Zahra
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood